

January 27. 1766.

A N S W E R S

F O R

JOHN BRUCE and Company, Printers
in *Edinburgh*;



T O T H E

PETITION of DAVID BEAT Merchant
there.

THE printed bills in use to be dispersed or placarded in all theatrical performances, for advertisement to the publick of the entertainment that is to be exhibited, are universally known and allowed to be the most useful, profitable, and necessary article of expence attending these exhibitions; as it is by means thereof, that notice is conveyed to all ranks and degrees of persons, both of the exhibition itself, and other interesting circumstances, as may induce multitudes to attend these meetings.

And as it is no secret, what immense sums the *Canongate* concert-hall has, for a course of years, gained by the entertainments there exhibited, these public bills may, with justice, claim some degree of merit therein; so that, if any debt, contracted for the purpose of these exhibitions, was to have a preference, those who furnished the bills and advertisements have a just title to be preferred.

These entertainments were so acceptable to the better, or more polite company frequenting this city, that *Henry Thomson*, and others, did resolve to raise, upon their own expence, a hall fit for these exhibitions; in the view of which, they

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they procured a lease for 25 years, from *Richard Cooper* engraver, of that area in the *Canongate* where the concert-hall was afterwards erected, and properly furnished with scenes, cloaths, and other decorations, at a very considerable expence.

The *dramatis personæ* necessary for exhibiting these entertainments, collected from all different quarters, are, for the most part, such an unruly set of people, that a good understanding cannot long subsist between them, without some person of authority being placed at their head, who may have the management and direction of the whole machine: Where that is wanting, they split into parties and factions, whereby the whole fabric is endangered. And such, in particular, was the state and condition of this concert-hall, when *John Lee*, a theatrical performer of higher character than any that had ever been in this country, yielded to the invitations he had received of coming down to *Edinburgh*, to take upon him the management and direction of this concert-hall.

March 1753,
Messrs. Lock-
hart and El-
liot's decret
arbitral.

It was with difficulty that those who were already in the administration, and who were also proprietors of the hall, could be prevailed upon to quit the helm. But as most of the *beau monde*, with whom *John Lee* stood then in high favour, interested themselves warmly in his behalf, it produced a reference and submission between the original proprietors and sundry of their creditors, and the said *John Lee*; whereupon a decret arbitral was pronounced in March 1753, decerning and declaring the tack of the ground, concert-hall, and other buildings raised thereon, scenes, machinery, cloaths, and whole other appurtenances, to belong to the said *John Lee*; and, on the other hand, decerning and ordaining *John Lee* in payment and performance of the particulars therein after mentioned; viz. In the first place, To relieve the said *Henry Thomson* and others, the original proprietors, of the tack duties then resting, or which should thereafter become due to *Richard Cooper* during the remaining years of said tack; and to implement and perform all other

other prestations thereby incumbent upon them. 2dly, To pay at the terms, and by the proportions therein mentioned, to the several creditors therein specified, the particular sums, to the amount of several hundred pounds, of debts contracted on account of the concert-hall. 3dly, During the remaining years of said tack, to pay to *Edward Augustus Davenport*, for himself and wife, 1 l. 5 s. *Sterling* weekly, and the like sum to *William Berry*, another performer, for himself and wife; and to allow to each of the said *Edward Augustus Davenport* and *William Berry*, during the continuance of said tack, a benefit night to each of themselves, and half a benefit night to each of their wives, once every year, between the first of *November* and first of *April*; these annuities to be restricted to so much a lesser sum upon either of their deaths, or that of their wives; but under this condition, that they and their wives should perform due and regular service to the said *John Lee* in these theatrical entertainments. 4thly, To make payment, during the continuance of said tack, of 50 l. *Sterling* yearly to the aforesaid *Henry Thomson*, proviso that the same should cease, in case of the said *Henry Thomson's* dying, during the currency of the lease.

The decret arbitral contains various other decernitures unnecessary to be mentioned; but from these above stated, it will be apparent to your Lordships, that tho' *Lee* was personally decerned in payment of the tack duties and annuities above mentioned, it was manifestly understood and intended, that these should be burdens upon the concert-hall and its appurtenances, and to be paid out of the profits arising upon the entertainments therein exhibited; and as, by means thereof, *Lee* was naturally led to think that he had thereby secured a lasting and profitable establishment, upon the faith thereof, he launched out into a very great expence, in meliorating and improving both the hall itself, scenes, and other machinery, and in purchasing suitable dresses corresponding to the different personages that were to be represented.

But,

But, as popular favour is seldom of long duration, *Lee* fell into disrepute, whereby the profits of the concert-hall began gradually to diminish; and as he was thus disabled from making these payments out of the profits of the hall, which his creditors had been made to expect, they threatened him with diligence both personal and real; which, if not prevented, the house, with all its appurtenances, must soon have been pulled to pieces, and a stop put to any of these exhibitions.

Matters so standing, *Lee* naturally applied himself to those gentlemen by whose favour and countenance he had hitherto been supported: And having laid before them a fair state of his affairs, both of the debts he owed, and of the funds he was possessed of, which were none other than the tack of the concert hall, scenes, machinery and cloaths, terms were proposed and concerted for denuding him of his right to the premises, and vesting the same in these gentlemen.

In pursuance of this concert, *Lee*, by disposition, dated 27th *December* 1754, conveyed his whole right to the tack, concert-hall, and whole other premises, in favours of Lord *Elibank* and the other gentlemen.

Tho' by this disposition *Lee* had acknowledged payment of 500 *l.* as the stipulated price, it is an agreed fact, that not one farthing thereof was paid to *Lee* himself; but that 316 *l.* of it was retained for the gentlemen's relief of a bond which they had granted to *Moubray* and *Clapperton*, two of *Lee*'s creditors, who were threatening immediate diligence; and, for *Lee*'s security of the residue, one of the gentlemen gave a declaration to *Lee*, for himself, and in name of the other disponees, bearing, "That altho' the disposition bore
" the receipt of the price of 500 *l.* yet there was truly paid
" by them but 316 *l.* by a bond they had granted for that
" sum to *Moubray* and *Clapperton*; and the remainder of the
" 500 *l.* was still in their hands."—And it is also an agreed fact, that this remainder was thereafter drawn out of their hands by decret of furthcoming, at the instance of *Hugh Hamilton* merchant in *Edinburgh*, who for himself, and some others

others of *Lee's* creditors, had used arrestment in the hands of these gentlemen.

Upon the aforesaid disposition, a formal instrument of delivery and possession, was, of this date, taken by the aforesaid gentlemen, whereby their right to, and possession of the concert-hall, was published and made known. Jan. 23.
1755.

Whatever shall be supposed to have been *Lee's* motives for entering into this transaction, it was plainly a most unprofitable bargain upon his part.—The 500 *l.* which he was to receive as the agreed price, was far short of the debts which were laid upon him by the aforesaid decret arbitral, as contracted by the original owners, not to mention the annuities to *Thomson, &c.* to which, by the same decret arbitral, he was subjected, during the whole years of the lease, or the sums he himself had expended in new buildings and decorations, scenes, cloaths, &c. a great part of which was still owing.—And for this very subject, with the benefit of these after improvements made thereon by *Lee*, these gentlemen, by the after transaction with the defender, received a price of 1350 *l. Sterling*, which, the respondents presume, went for their relief and indemnification of the engagements they had come under, and of debts contracted in prosecution of this scheme.

But be that as it will, it is apparent, that however the disposition by *Lee* to these gentlemen was conceived in the above plain and simple terms, various particulars, tho' not therein expressed, must have been implied and understood; such as, that these gentlemen should be liable to the tack-duty, during all the remaining years of the lease, and to the annuities payable during the currency of said lease, to *Henry Thomson, Mrs. Hamilton*, and the other theatrical performers, who, from thence forward, would become the servants of these gentlemen, as proprietors of the concert-hall. For, as it would have been highly unjust, it can never be presumed that these gentlemen could intend, that after *Lee* was divested of the subject in their favours, whereby the profits of the entertainments, if continued, as it was plainly intended:

tended they should be, would belong to them, or be at their disposal, that *Lee* should, notwithstanding, remain subject to the aforesaid burdens, which could only be made good out of the proceeds of these entertainments. And that this was the sense and meaning of all parties concerned, is apparent from what afterwards followed; as *Lee*, during the after-period of his superintendency and management under the aforesaid gentlemen, made regular payment of the tack duty to *Cooper*, and of the aforesaid annuities, and which the gentlemen themselves did in like manner continue to pay, after that *Lee* was turned out of the management, down to the 1758, when, by the contract to be hereafter mentioned with *Callendar* and *Beat*, they transferred to them their right to the premises, with the burden, not only of the tack duty, but also, of paying the aforesaid annuities to *Thomson, &c.* a plain confession, that notwithstanding the simple tenor of *Lee's* disposition to them, their right was burdened with the payment of these annuities.

Feb. 27.
1755.
Comission by
the gentle-
men to *Lee*.

Matters being thus prepared, and the plan of after-operations concerted, whereby these entertainments were to be continued as formerly, under the management of *Lee*, as *præpositus* by the aforesaid gentlemen, there is produced in process a commission, of this date, granted by these gentlemen to *Lee*, under which he is said to have acted by powers delegated from them, and which is of the following tenor: " Do hereby give and grant *our full power and com-*
mission to the said John Lee, to use and vary the said house,
cloaths, and scenes at pleasure, as he shall judge necessary,
for carrying on the entertainments of said concert-hall, and to
do every thing thereanent, that we could do ourselves; de-
claring us and the premises noways liable for any debts
the said John Lee may contract, in carrying on the en-
tertainments of said house: And also declaring, that the
said John Lee shall be accountable and obliged to make
the said house, cloaths, scenes, and others, furthcoming
to us in the same, or equal good condition, conform to
said instrument of possession and inventory therein refer-
 red

“ red to. And, lastly, Declaring this our commission to said
 “ John Lee, to continue during our pleasure, and only until the
 “ same be recalled by us, or the majority of said disponees, in
 “ writing.

From this deed, of the tenor above recited, it is clear and evident as words can make it, that no right whatever was thereby granted or transferred to *Lee*: What powers were thereby committed to him, were merely ministerial, as by commission from these gentlemen, his constituents, which, in the respondents apprehension, imports as clear a *præpositura* as can be conceived.—2dly, The special powers thereby committed to him, were those, and none other, viz.
 “ To use and vary the said house, cloaths, and scenes at pleasure, as he shall judge necessary for carrying on the entertainments of the said concert-hall:” So that, in as far as he acted *ultra* of the above particulars, it was not by virtue of any special powers contained in this commission, but under the general powers implied in every *præpositura*, or as may have been privately concerted between these gentlemen and him.—3dly, And more particularly, your Lordships will observe, that the commission is altogether silent, as to the profits arising from these entertainments, to whom they were to belong, or how to be applied. The petitioner says, in name of the gentlemen, that the benefit of these was intended for *Lee* himself; and the respondents are willing to believe that it was so: But whatever they may have done *ex gratia*, there is nothing expressed in the commission that could have imported any such obligation upon them; nor can the respondents doubt, that if the gentlemen had been so disposed, they might have compelled *Lee* to have accounted to them for every farthing of the profits of these entertainments, any thing in this commission notwithstanding.—4thly, This is further confirmed, from observing, that no proviso is therein made, nor any obligation laid upon *Lee*, to pay either the tack duty, public taxes, or any of the other burdens to which these gentlemen, as proprietors of the concert hall, were subject, and which were now become

come their proper debts: And if it shall be supposed to have been an implied condition in this commission or *prepositura*, that these should be paid out of the profits, it follows by necessary consequence, that these profits were in so far applicable for the benefit and utility of the gentlemen, the constituents of *Lee*.—5thly, This is further illustrated by the last clause in this commission, which declares the same revokable at pleasure; so that, upon a moment's warning, they were at liberty to discard *Lee*, and reassume the management and possession.

And this, in fact, happened to be the case: For as *Lee*, probably by misconduct, had incurred the displeasure of these gentlemen, his constituents, they, without a moment's previous notice, turned him out, and took possession of the concert-hall, and continued to exhibit the entertainments by others commissioned by them.

And upon the plan of the argument that is now maintained on the part of the petitioner, *viz.* that neither the gentlemen, nor the concert-hall itself, scenes, cloaths, &c. were to be liable for any furnishings made to *Lee*, in carrying on these entertainments, your Lordships will easily perceive what severe consequences this summar removing must have been attended with, not only to *Lee*, but to all poor tradesmen making daily furnishings to *Lee*, for carrying on these entertainments. *Lee*, by the decret arbitral, was personally subjected to the payment of the annuities during all the years of the lease. By the commission from the gentlemen, supposing that to have been the commission under which he acted, he was authorised to make whatever improvements he judged necessary for carrying on the entertainments. Some credit, more or less, was in the nature of things unavoidable; ready money could not be expected for all the furnishings: He is summarly removed this day, and the furnishings of the very preceeding night are not to be paid, unless they can be recovered from *Lee* himself. If this is law, in the present case, it must be a hard law: But the respondents cannot allow themselves to think, that any law
in

in the world will give countenance to such a manifest injustice.

That from this time forward, *Lee* was no other than the manager of this concert-hall, the *propositus* under the gentlemen, is, to the respondents apprehension, as clear as sunshine, from the whole of these transactions, whereof the particulars have been above stated. And the respondents are now to submit to your Lordships another piece of evidence, which, were the gentlemen themselves in court, they certainly would not dispute, because it is their own express acknowledgment, and shows to demonstration their sense and meaning in this matter.

What the respondents here point at, is the contract between these gentlemen on the one part, *James Callendar* and *David Beat* upon the other part; whereby the gentlemen, on the terms and conditions therein mentioned, transferred their right to the whole premises in favours of *Callendar* and *Beat*, for the agreed price of 1350 *l. sterling*, payable at the terms, and by the proportions therein specified.

Nov. 1758,
Contract
between the
gentlemen,
and James
Callendar
and David
Beat.

By this contract it is, *inter alia*, conditioned, " That the
" said *James Callendar* and *David Beat* shall be thereby bound
" and obliged, to free and relieve the gentlemen of all claims
" against the concert-hall, preceeding the date of the assign-
" ment by the said *John Lee* to them, before mentioned; as
" also, of all claims against the same, or on account of any thing
" done or contracted by *John Lee*, as their Manager, from
" the time of his assignation to them, till he was turned out of
" the management." These words are liable to no ambiguity.
It is thereby expressly acknowledged, that from the period
of *John Lee*'s assignment to them, till he was discarded, he
was their manager: And as the gentlemen were from thence
justly sensible, that they were liable for the debts contracted
by their manager, in carrying on said entertainments; and
as by the agreement with *Callendar* and *Beat* they were to
have the above mentioned sum of 1350 *l.* paid to them,
neat and clear of all deductions, it was consequential and
necessary to stipulate relief from *Beat* and *Callendar*, who

were thus to be substituted in their full right, of all debts contracted by *Lee* during the aforesaid period.

It is said, that this would have been a foolish bargain on the part of *Callendar* and *Beat*, as they could not know what the extent of these debts might be. But this can be of no weight against positive agreement: The amount of the debts contracted by *Lee* in that period, was by that time well known, of which they were willing to take the risk, and for which consideration must have been had, in settling the price that they were to pay for the whole subjects.

By the same contract, the gentlemen stipulated relief of the following particulars, viz. 1st, Of the tack duty payable to *Richard Cooper*, being 14 *l. sterling* yearly. 2^{dly}, Of all repairs to the concert-hall. 3^{dly}, Of the cess, and all other publick burdens. 4^{thly}, Of the annuity of one guinea *per week*, payable to Mrs. *Hamilton* during her life, in terms of another decret arbitral which had ascertained that annuity to her. 5^{thly}, Of the annuity payable to *Henry Thomson*. And as your Lordships have seen, that no such relief was stipulated, nor no such burden imposed in the commission granted to *Lee*, tho' the respondents do not doubt, that it was understood or implied, that the profits of the concert-hall, which were not thereby assigned to *Lee*, but which he was allowed to levy, should, in the first place, be applied for these uses and purposes; the respondents will be pardoned to consider this as real and undisputed evidence, in confirmation of the other proofs above stated, that *Lee* was no other than manager or *præpositus* of this concert-hall, under these gentlemen; and that the profits, from thence arising, were to be applied for the benefit and advantage of these gentlemen, in payment and relief of the aforesaid debts and burdens to which they were liable, and which were their proper debts. So that however, *ex gratia* to Mr. *Lee*, and in remuneration to him of the trouble he was to have in the management of this their concert-hall, and of the entertainments therein exhibited, they allowed him the benefit of the surplus profits, this can never alter the nature of their right, or of that *præpositura* under which *Lee* alone did, or could act in the premises.

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These things being premised, by which the respondents are hopeful to have, in a great measure, obviated the argument chiefly insisted upon in this reclaiming petition; the respondents proceed to observe, that the debt for which they pursue, is the accompt of furnishings to *Lee* during the aforesaid period that he officiated as manager under these gentlemen, in printing and furnishing the daily bills and advertisements for the entertainments exhibited in this concert-hall, which, as already said, is one of the most useful, profitable, and necessary articles of expence, of any that can be conceived in a matter of this kind: And as the profits arising from these entertainments, during the aforesaid period, are known to have been very large, they cannot but think it extremely hard, that any failzie or neglect on the part of *Lee*, in misapplying the profits arising from these exhibitions, or the imprudence of the gentlemen in reposing such unbounded confidence in him, should throw the loss from thence arising upon the poor tradesmen, who, *bona fide*, made these furnishings.

And the respondents humbly think they have the more cause to complain of this, that tho' it was universally known that these gentlemen were then become proprietors of the concert-hall, and that *Lee* was only employed as manager under them, no publication was made to certify these who should make the furnishings for the service of the concert-hall, that they should have no reliance for their payment but upon *Lee* himself; tho' every principle of law, justice, and reason, required such publick notification, if any such thing had been in view by the transaction between these gentlemen and *Lee*.

The rules of the civil law are express upon this point, upon supposition that *Lee* was the *prepositus* or manager under these gentlemen, which the respondents are hopeful they have clearly established to be the case. Justice requires it should be so, and it is founded in reason.

All the writers upon the publick law, have established the same principle in the case of ambassadors from one state to

to another: The ambassador's publick commission is his credentials: His private instructions may regulate matters between his sovereign and him; but the sovereign of the other state to which he is sent, is neither supposed to know, nor bound to notice what private instructions he may have.

There is, at the same time, no evidence that the above mentioned commission to *Lee* was ever delivered.—It was not found in his possession, nor has any proof been offered that it ever was in his hands; and there is reason to believe, that, in fact, it never was delivered.—But whether delivered, or not, it was a private latent deed; and however effectual the clause referred to may be, to have obliged *Lee* to relieve these gentlemen of all the debts contracted by him for carrying on these entertainments, as they are said to have allowed him the profits, third parties, who had no access to know these private stipulations, have no concern therewith.—His *præpositura*, proved *rebus et factis*, under the eye of these very gentlemen, one or other of them, for the most part, present at every night's entertainment, was the commission to which the lieges were to give attention, and justified them in making the proper and necessary furnishings for the service of the concert-hall.

Had it been made known to the furnishers that *Lee* was to be discarded, the usual profits of one or two nights entertainments, would have gone far to have paid all that was due to the accustomed furnishers:—But being summarily turned off, without one moment's previous warning, he had it not in his power to do them justice, nor had they the means of operating their payment.—The only fund he had in the world, was the balance of the 500 *l.* in the hands of those gentlemen, which some of the creditors, more fortunate than others, having got intelligence of, operated their payment by arrestment and furthcoming. The respondents, willing to take their payment in the easiest manner, followed their example; but the subject was pre-occupied by the prior arrestments. They used their best endeavours to operate their payment from *Lee* himself, and made frequent

quent remonstrances to one or other of the gentlemen of the hardship of their case, in hopes that justice would be done them. That they were not forward to engage in a law-suit with so powerful a body, cannot be matter of surprise: But when they understood, that by the contract 1758, *Callendar* and *Beat* were taken expressly bound to free and relieve these gentlemen of the debts contracted by *Lee*, as their manager, from the time he made over his right to them, till the time that they dismissed him from the management, they thought themselves well intitled to demand their money from Mr. *Beat*, as the payment and relief of these debts was part of the price, or consideration, that he was to pay for the purchase of these subjects.

To this purpose, they brought their action before the sheriff, where they prevailed, and obtained judgment in their favours. The defender removed the cause by advocacy, and the Lord Ordinary was pleased to give judgment against them; but upon advising a reclaiming petition and answers, your Lordships pronounced the following interlocutor, 10th *December* 1765, " Repel the defence, " that the defender is not liable for the accompts pursued " for; but sustain the defence of the triennial prescription."

A reclaiming petition was presented on the part of the pursuers, reclaiming against the last part of this interlocutor, " Sustaining the defence of the triennial prescription:" And documents were therewith produced, which, the respondents are advised, must be sufficient to interrupt that short prescription.

The defender put in his answers, and, at the same time, reclaimed against the first part of said interlocutor, " Repelling the defence, that the defender is not liable for " the accompts pursued for;" and the same being appointed to be answered, the respondents do not desire to take any advantage of its not being within the reclaiming days; but as the case stands precisely where it did, they flatter themselves, that nothing has been offered to induce your
D Lord-

Lordships to depart from the judgment already given upon that first point.

The whole of the defender's argument may be reduced under two general heads; 1st, That the defender can be no further liable by his obligation of relief to the gentlemen, than the gentlemen themselves would have been, were the respondents now insisting against them; that by the commission which these gentlemen are supposed to have granted to *Lee*, it was expressly conditioned, that they should not be liable for the debts contracted by him, in carrying on these entertainments; and therefore, that the respondents can have no action for these against him. 2^{dly}, That from the documents now and formerly produced, it appears, that the respondents did follow the faith of *Lee* himself, that the furnishings were made upon his credit, and that they trusted to him for their payment.

In answer to the first of these, the respondents admit, that the defender is no further liable to them than the gentlemen themselves would have been. But they have maintained, and they hope with success, that was the question now with the gentlemen, they must have been liable: That *Lee* was the *præpositus*, or manager under them, not merely by virtue of the aforesaid commission, supposing it to have been delivered, of which there is no evidence, but *rebus et factis*, by his being *præpositus huic tabernæ*. And they have further proved, by the gentlemen's express acknowledgment in the contract 1758, that *Lee* was their manager during that whole period. And therefore, without repeating the authorities formerly stated and referred to upon this point, or the general principles of the laws of all nations in the question of *præpositura*, they submit it to your Lordships, without further argument, that as the *præpositura* itself proved *rebus et factis*, was the only commission which the lieges had access to know, it does not concern them what private stipulations were between the *institor* and the *præpositus*. These may be available in questions between themselves; but third parties, who contracted with the *præpositus*

tus de re præposita, are not concerned therewith. And, taking the commission as it stands, it is apparent how short the special matters therein mentioned are of the powers and authorities with which *Lee*, as manager, must necessarily have been invested.

The other point which is mostly laboured in the defender's reclaiming petition, as supposing the respondents to have made these furnishings merely upon the faith and credit of *Lee* himself, is founded upon a principle manifestly erroneous in point of law, and contradicted by daily practice, both in the case of the *magister navis*, and the *præpositus tabernæ*. It may not happen in one of a thousand instances, that those who contract either with the *magister navis*, or the *præpositus tabernæ*, have the means to know, to what particular person or persons either the *navis* or *taberna* do belong. If they contract with that person to whom *totius rei cura est mandata*, and who is *in officio* acting as such, however indisputable it may be that they primarily follow the faith of the person with whom they contract, and may have no knowledge that either the *navis* or *taberna* belongs to any other person, the law subjects, in the one case, both the *exercitor* and *magister*, and, in the other, both the *præpositus et præponens*, to the performance of all the obligations, and payment of all the debts which the *magister* or *præpositus* have fairly contracted *super re præposita*.

The subtilty of the *Roman* law did not allow the *actio directa*, but the *utilis actio*, to the *exercitor*, or *dominus tabernæ*, *ex contractu magistri navis, vel præpositi tabernæ*; but the laws and practice of all modern nations, throwing aside this subtilty, have allowed the *actio directa* in both cases.

This is so much *triti juris*, and so established by every lawyer who has wrote upon the subject, as renders it unnecessary to mention authorities; and if the respondents are rightly advised, not a single authority or precedent can be produced, where this distinction was allowed of, whether the furnishers, either to the *navis* or *taberna*, relied upon the credit, or followed the faith of that person only with whom they contracted.

And

And whatever other privileges are by law or practice allowed, either in the *exercitoria* or *institoria actio*, the respondents apprehend, and submit it to your Lordships, that the same principle obtains universally in the common case of every *mandatum*. If *A* gives commission to *B* to purchase goods from *C*, tho' *C* knows nothing of the commission, both will be liable to him for the price; *B*, *ex contractu*, *A*, *ex mandato*; tho' *C* was quite ignorant of the commission, and followed the faith of that person only with whom he contracted.

If these principles are just, and if both the gentlemen and *Lee* were liable to the furnishers, the one *ex contractu*, the other *ex mandato*, whether expressed or implied, it cannot liberate the one, that the furnishers endeavoured in the first place to operate their payment from the other: This would have been no defence to *Lee*, had the respondents first brought their action against the gentlemen; and therefore it can as little furnish a defence to the petitioner, as in place of the gentlemen, that they endeavoured in the first place to recover their payment from *Lee*.

The defender has bestowed but a very few words in answer to the pursuers reclaiming petition upon the point of prescription. He admits, that the documents produced would be sufficient to interrupt that prescription as against *Lee*, tho' he is pleased to think that they should not be equally available against him. But the respondents submit it to your Lordships, that in as far as there are *termini habiles* for this prescription against all or any of the three accounts pursued for, as both the gentlemen and *Lee* were equally debtors therein; interruption against any one of them, or document taken from any of them, must be effectual to preserve the right against both.

The respondents case falls under the exception, where they prove the debt by writ of that person who was himself the contractor, and *propositus* by the others.

In respect whereof, &c.

ALEX. LOCKHART.

